



## The Journal of Appellate Practice and Process

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Volume 1 | Issue 2

Article 8

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1999

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#### Recommended Citation

Mori Irvine, *Better Late Than Never: Settlement at the Federal Court of Appeals*, 1 J. APP. PRAC. & PROCESS 341 (1999).

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# BETTER LATE THAN NEVER: SETTLEMENT AT THE FEDERAL COURT OF APPEALS\*

Mori Irvine\*\*

## I. INTRODUCTION

Nearly 95% of all federal civil cases will settle before trial,<sup>1</sup> leaving less than five percent of civil cases to be appealed.<sup>2</sup>

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\* Copyright © 1999 by Mori Irvine. This article is the next installment of a discussion started in Mori Irvine, *The Lady or the Tiger: Dispute Resolution in the Federal Courts*, 27 U. TOL. L. REV. 795 (1996). In that earlier article I examine what the federal courts are doing to assist litigants in settling their cases, and venture some thoughts on their success and, more importantly, on the appropriateness of their efforts. The reader should treat this article as a side trip from that journey—the appropriateness of federal court dispute resolution—which I still intend to treat at greater length (and, I hope, with greater nuance) in Mori Irvine, *Settlement at the Court of Appeals: Distilling or Diluting the Law?* (work in progress). The views expressed in this article are solely those of the author and do not reflect the views of the U.S. Court of Appeals, the Eleventh Judicial Circuit, the Chief Circuit Mediator or the Circuit Mediation Office. All errors are mine.

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1. The exact percentage of lawsuits that settle out of court varies by jurisdiction and the nature of the lawsuit. One study, now over 20 years old, found that only 4.2% of claims filed against insurance companies reached trial. See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 179 (1970). A 1980 study found 6.5% of federal district court suits reached trial. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *ANNUAL REPORT OF THE DIRECTOR* A-28 (1980). A study conducted in the mid-1980s found that less than 8% of civil suits filed in state and federal courts did not settle and were tried. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983); see also Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 670 (1986) (observing that over 90% of all civil cases settle before trial).

2. There is no clear statistic on the percentage of civil cases that are appealed, but it is a safe assumption that not all losers appeal. Nonetheless, “[b]ecause the decision to file a notice of appeal is a virtually cost-free, risk-free proposition, it is often a knee-jerk reaction to an adverse decision.” Jerrold J. Ganzfried, *Bringing Business Judgment to Business Litigation: Mediation and Settlement in the Federal Courts of Appeals*, 65 GEO. WASH. L. REV. 531, 540 (1997).

Those cases are the most difficult, most intractable and least likely to resolve short of a definitive judicial adjudication at the highest level. Their longevity, tenancy, and staying power have been well proven during the course of litigation.<sup>3</sup> Can anything be done to aid them in settlement? The federal courts have decided to make the effort.

## II. FEDERAL DISTRICT COURT PROGRAMS<sup>4</sup>

The first codification of dispute resolution in any federal court came when the United States Congress passed the Civil Justice Reform Act ("CJRA" or the "Act").<sup>5</sup> The Act encourages all federal district courts to implement alternative dispute resolution ("ADR") programs to help reduce delay in civil litigation and provide litigants alternative means to resolve their disputes.<sup>6</sup> The Act authorizes the courts to use dispute resolution and specifically lists a variety of processes the district courts might implement. As a result, the federal courts have experimented with dispute resolution<sup>7</sup> and a variety of settlement mechanisms are present in the courts. Mediation,<sup>8</sup> arbitration,<sup>9</sup>

3. As circuit mediator I call these cases "the toughest two percent."

4. A similar discussion can be found at Irvine, *supra* note \*, at 796.

5. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-06, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-82 (Supp. V 1993)).

6. *Id.* § 103(a). These civil delay reduction plans were required to be completed by December 1, 1993.

7. The first formal recognition of ADR's role in the federal courts came with the 1983 amendments to Federal Rule of Civil Procedure 16, which provided for the use of "extrajudicial procedures to resolve the dispute." FED. R. CIV. P. 16(b)(7). However, federal district court experimentation began with court-based arbitration programs in the late 1970s. DONNA STIENSTRA & THOMAS E. WILLGING, ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL COURTS? 4 (1995).

8. Mediation is the use of a third-party neutral to facilitate a settlement that the parties themselves devise. S. REP. NO. 416, at 29 (1990), 1990 U.S.C.C.A.N. 6803, 6832.

In its simplest form mediation is a process through which two or more disputing parties negotiate a voluntary settlement of their differences with the help of a third party (the mediator) who typically has no stake in the outcome. The parties' negotiation is guided and structured by the mediator, who acts primarily as a catalyst for the process by shaping both the agenda and the discussion. The mediator helps the parties identify issues and explore possible solutions. The mediator also encourages each party to accommodate the other party's interests. As mediation expands and develops, providing a single universal definition of this process becomes increasingly difficult. The preceding description, however, illustrates the classic mediation model.

and neutral case evaluation<sup>10</sup> are the most common, but there are summary jury trials<sup>11</sup> and other hybrids<sup>12</sup> available. Each brings a different settlement opportunity to the parties. Each provides a different approach toward resolution without the need for final intervention of the courts by way of order or decision.

Since the Act, the district courts' efforts reflect diversity and experimentation in promoting settlement to the litigants. In addition to the traditional judge-directed settlement conference,<sup>13</sup> the courts have elected to adopt one or more of the six processes

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Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L.J. 155, 158 (1994) (internal quotes and footnotes omitted).

A mediator can be envisioned as the Sherpa guide of the negotiation process. The Sherpa guide does not tell the explorers which mountain to climb, or whether to climb a mountain, the Sherpa guide helps the expedition find the best way to the top. Similarly, a mediator does not tell the parties when or how to settle a case, but will help the parties maneuver towards resolution.

*Id.* at 158 n.13. For a more detailed discussion of mediation, see *id.* at 158-61.

9. In 1988 Congress authorized the implementation of ten mandatory arbitration programs with ten more courts permitted to offer such programs. 28 U.S.C. §§ 651-658. Arbitration is a dispute resolution process where a third-party neutral sits as fact-finder and decisionmaker. The arbitrator conducts a hearing during which evidence is presented in a more informal setting and where the rules of evidence are often relaxed. After all the evidence has been presented, the arbitrator rules on the case. A disappointed litigant has the right to pursue a trial de novo.

10. CJRA § 103(a). However, Early Neutral Evaluation ("ENE") started before this. In this process the third-party neutral provided the litigants with a non-binding advisory opinion of the probable outcome if the matter went to trial. Early Neutral Evaluation is also known as Early Neutral Case Evaluation or Case Evaluation. For a more detailed description of this process, see Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986).

11. In a summary jury trial, the parties present condensed versions of their case to a jury, which renders an advisory opinion to the litigants. This advisory opinion then serves as a starting point for the parties to discuss settlement. S. REP. NO. 416, at 28-29 (1990), 1990 U.S.C.C.A.N. 6803, 6831-32.

12. For example, the courts may now refer cases to mini-trials. In a mini-trial the attorneys present evidence and legal arguments to representatives of the parties so they may better understand the issues of the case and be in a better position to negotiate a satisfactory settlement. S. REP. NO. 416, at 29 (1990), 1990 U.S.C.C.A.N. 6803, 6832.

13. Settlement conferences are the most common dispute resolution mechanism. In this process, the attorneys, sometimes with their clients present, meet with a judicial officer, usually a judge or a magistrate, to discuss settlement. Two-thirds of the district courts offer some variation of the settlement conference. JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT 6 (1994) [hereinafter CIVIL JUSTICE REFORM ACT REPORT]. The Judicial Conference of the United States prepared this comprehensive report on the implementation of the Civil Justice Reform Act, pursuant to 28 U.S.C. § 479(a). *Id.* at 1.

authorized by Congress in the Act. Nearly half of the district courts have established a court-managed mediation program.<sup>14</sup> A third of the courts offer some form of arbitration.<sup>15</sup> Thirty-nine federal trial courts approve the use of summary jury trials,<sup>16</sup> and twenty-five have authorized the use of mini-trials.<sup>17</sup> Early Neutral Evaluation has not been adopted with the same enthusiasm. Only sixteen courts have included ENE in their dispute resolution program offerings.<sup>18</sup>

Congress has since decided this experiment in dispute resolution should become an integral part of the district courts. The Alternative Dispute Resolution Act of 1998 mandates that all district courts establish and offer dispute resolution to the litigants.<sup>19</sup> Where there had been experimentation, there is now a mandate: The courts must give the litigants a clear opportunity to resolve their problems themselves before the courts take that control away from them and decide their case.<sup>20</sup>

The Act requires all United States District Courts to authorize the use of ADR processes in all civil actions. The courts are required to devise and implement an ADR program to encourage and promote the use of ADR in each district, to examine the effectiveness of existing ADR programs, and to adopt appropriate improvements. Each court must retain or designate an employee or judicial officer who is knowledgeable in ADR practices to implement, administer, oversee, and evaluate that court's ADR program.<sup>21</sup>

The federal trial courts may have been the first federal courts to adopt dispute resolution in some form, but they are no longer alone in providing settlement opportunities. The United

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14. *Id.* at 6.

15. *Id.*

16. See generally DAVID RAUMA & DONNA STIENSTRA, THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK, 285-98 (1995) (listing the ADR methods approved by each district court) [hereinafter SOURCEBOOK].

17. See generally *id.*

18. See CIVIL JUSTICE REFORM ACT REPORT, *supra* note 13, at 7.

19. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993, 2994.

20. *Id.*

21. *Id.*

States courts of appeals have also implemented programs to provide alternative avenues for settlement to disputants.<sup>22</sup>

### III. FEDERAL COURTS OF APPEALS PROGRAMS

The United States Court of Appeals for the Second Judicial Circuit took the lead when it established a settlement program in 1974. Its goal was to assist litigants in resolving their cases without the need for the appeal to result in a final decision by the court.<sup>23</sup> Inspired by district court dispute resolution programs, Chief Judge Irving R. Kaufman believed that similar settlement efforts would benefit the court of appeals.<sup>24</sup> This vision of settlement at the court of appeals became the Civil Appeals Management Plan (CAMP). Virtually all civil cases that reach the Second Circuit are referred to CAMP.<sup>25</sup> First in time, CAMP may have served as the impetus for subsequently established Circuit Court mediation programs,<sup>26</sup> all of which were created to help litigants settle while on appeal.

#### A. *Why Settle on Appeal?*<sup>27</sup>

Settling a case while it is pending on appeal may seem counterintuitive. There is already a winner and a loser, so what

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22. Interestingly, the success of the federal courts of appeals mediation programs caused Congress to mandate that district court dispute resolution move from the experimental to the mainstream. "[T]he continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts . . ." Alternative Dispute Resolution Act of 1998 § 2(3).

23. Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 *FORDHAM L. REV.* 253, 261-62 (1988).

24. *Id.* at 261.

25. *Id.* at 262 (citing Irving R. Kaufman, *The Second Circuit Review—Safeguarding Judicial Resources: The Joint Duty of Bench and Bar*, 52 *BROOK. L. REV.* 579, 586 n.24 (1986)).

26. Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 *YALE L.J.* 755, 761-62 (1986). Chief Judge Kaufman observed that "[i]f imitation is any measure of achievement, CAMP has indeed earned high marks. Since the inception of CAMP in 1974, four circuits and more than a dozen states have implemented or experimented with pre-argument conference programs." *Id.*

27. There is an excellent list of reasons listed in Thomas F. Ball III, *Appellate Mediation in the Fourth Circuit: An Idea that Works*, 9 *S.C. LAW.*, Nov.-Dec. 1997, at 28, 30 (1997). This is a brief summary from that list.

would motivate them to compromise and settle at this point? The answer is that, even though the case is on appeal, it is still driven by the professional, practical, and personal motives of the participants. Consequently, appellate cases remain ripe for mediation and do settle on appeal.

The parties' professional motives often include a concern with the probabilities of winning on appeal (does the client want to take the risk of losing on appeal?), an interest in protecting a favorable lower court opinion (does the client want to lose that decision?), and the availability of alternative legal avenues that are better suited to resolving the client's problem (the federal court of appeals is not always the best forum).

The party's practical interests may also push them towards mediation. An appeal takes a long time to reach a final decision,<sup>28</sup> and waiting may be disruptive to the client's business. It may cost the client less to settle now rather than later, and the payments can be structured to be convenient for the client and to maximize tax benefits.

Finally, the parties are driven to mediation by personal concerns. A party may have an immediate need to settle for financial reasons. The client may have developed a willingness to move beyond the conflict and finally let go of it. The client may be motivated by fairness and believe that settlement is the right thing to do regardless of the law. Ultimately, settlement brings peace of mind to the participants.

With these motivations, all the parties need is a forum to allow them to explore settlement. Mediation gives them this forum. A risk-free environment and a trained neutral equipped to fully explore these motivations help the participants fashion a solution that satisfies their interests, even on appeal.

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28. In the Eleventh Circuit it takes a civil appeal an average of 14 months to result in a final decision. *See* Court Statistical Report (internal court document on file with author).

*B. U. S. Court of Appeals, Eleventh Judicial  
Circuit Program*<sup>29</sup>

To date, nearly every United States court of appeals has established a mediation program to assist parties in resolving their appeals.<sup>30</sup> These courts of appeals programs are generally established under Federal Rule of Appellate Procedure (FRAP) 33<sup>31</sup> in conjunction with a local rule or order.<sup>32</sup> While each is unique, conducted in a fashion that best suits the individual court's settlement mission, there are more similarities among the programs than differences. The Eleventh Circuit mediation program, which shares many of its characteristics with other circuit court programs, is detailed below as an example of the federal courts' mediation efforts.<sup>33</sup>

In the Eleventh Circuit, mediation conferences are conducted by the court's circuit mediators, pursuant to FRAP 33

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29. A less detailed discussion of these programs can be found at Irvine, *supra* note \*, at 798. This description of the program and how it operates is taken from a descriptive narrative created by the Circuit Mediators that is on file with the author.

30. The Federal Circuit remains the sole circuit without a mediation program. See JAMES B. EAGLIN, *THE PREARGUMENT CONFERENCE IN THE SIXTH CIRCUIT COURT OF APPEALS* 5 (FEDERAL JUDICIAL CENTER 1990); *Appellate ADR: D.C. Circuit Experimenting with Mandatory Mediation in 100 Lawsuits*, 6 *ALTERNATIVES* 35, 35 (1988); Ganzfried, *supra* note 2, at 531; John Martin, *Eighth Circuit Court of Appeals Preargument Conference Program*, 69 *JUDICATURE* 312, 312 (1986); Pamela Mathy, *Experimentation in Federal Appellate Case Management and the Prehearing Conference Program of the United States Court of Appeals for the Seventh Circuit*, 61 *CHI.-KENT L. REV.* 431 (1985); Robert Rack, Jr., *Pre-argument Conferences in the Sixth Circuit Court of Appeals*, 15 *U. TOL. L. REV.* 921 (1984).

31. The rule provides:

The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

*FED. R. APP. P.* 33.

32. See, e.g., 11TH CIR. R. 33-1.

33. For a description of other circuit mediation programs, see EAGLIN, *supra* note 30; David Aemmer, *Appellate Mediation in the Tenth Circuit*, 26 *COLO. LAW.* 25 (Oct. 1997); *Appellate ADR*, *supra* note 30; Ball, *supra* note 27; Ganzfried, *supra* note 2; Martin, *supra* note 30; Mathy, *supra* note 30; Rack, *supra* note 30.



and 11th Circuit Rule 33-1.<sup>34</sup> Under the circuit's rules, judges may participate in the conferences, but rarely do so.<sup>35</sup> These conferences may address any procedural questions or problems that are raised by the parties. However, the primary purpose of these conferences is to offer participants a confidential, risk-free opportunity to explore all possibilities for the voluntary disposition of the appeal and the case.<sup>36</sup>

Most civil cases are eligible for selection into the program<sup>37</sup> and can be placed in the program in one of three ways: selection by a circuit mediator, a confidential request by counsel, or a referral by hearing panels either before or after oral argument.<sup>38</sup> Most initial mediation conferences are scheduled before a briefing order has been issued. If all counsel are located in the Atlanta area,<sup>39</sup> the initial conference is held in person at the court. Otherwise, initial conferences are by telephone with the court initiating the calls. At the mediator's discretion, conferences for cases outside the Atlanta area may be conducted in person.

For the most part participation is mandatory. If there is a compelling reason that mediation would not be appropriate, the lawyer is free to call the circuit mediator and explore those concerns. As a result, the mediator may cancel the conference. Otherwise, the appearance and participation by counsel is expected.<sup>40</sup> Settlement, of course, is not required and the parties

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34. The circuit mediators are full-time employees of the court who conduct settlement conferences. See 11TH CIR. R. 33-1(b)(1). The circuit maintains two mediation offices. The main office, with three mediators, is located in Atlanta, Georgia. A single mediator occupies the branch office in Tampa, Florida. A Miami office is anticipated to be operational within the next two years.

35. *Id.* at 33-1(c)(1).

36. *Id.*

37. All fully counseled civil cases except prisoner, habeas corpus, and immigration cases are considered suitable for the program and are eligible for selection. *Id.* at 33-1(a)(3).

38. *Id.* at 33-1(c)(1).

39. The United States Court of Appeals for the Eleventh Judicial Circuit sits in Atlanta, and the main Circuit Mediation Office is located there as well. The Eleventh Circuit encompasses Georgia, Alabama, and Florida. As a result, parties and counsel often are located well beyond the Atlanta area.

40. The circuit rule provides:

Upon failure of a party or attorney to comply with . . . the provisions of the court's notice of mediation conference, the court may assess reasonable expenses caused by the failure, including attorney's fees; assess all or portion of

will not be coerced into settling by the mediator. Instead, the conference is an opportunity to explore the possibility of devising a settlement that satisfies the client's concerns and interests.

Like classic civil mediation,<sup>41</sup> the mediation conference is conducted in a series of joint and separate meetings with the mediator initially talking with both sides together and then meeting with each side separately. Conferences generally begin with an inquiry as to any procedural questions or problems that can be resolved by agreement. These might include questions about the record excerpts or the need for a specially tailored briefing schedule.<sup>42</sup> If negotiations are productive, and everyone agrees, briefing may be postponed for a reasonable time until negotiations are completed.<sup>43</sup>

The discussion then moves to an explanation by each party of the issues on appeal. The purpose of this discussion is not to decide the case, but to understand the issues and to evaluate the risks—to both sides—on appeal. In many cases a candid examination of the case is helpful in reaching a consensus on the settlement value of the case. This examination may be done in a joint session or with the mediator talking privately to each party.<sup>44</sup>

Private discussions are often more candid than the joint session. During these sessions the mediator and the participants talk about the party's interests, explore more realistic settlement

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the appellate costs; dismiss the appeal; or take such other appropriate action as the circumstances may warrant.

11TH CIR. R. 33-1(f)(2).

41. For an explanation of classic civil mediation, see *supra* note 8.

42. The mediator has the authority to grant extensions to the parties for the filing of their briefs. This is done to facilitate the settlement talks. Only if the case is in active settlement discussion will this be done, and only with the consent of all the participants. Otherwise, mediation does not delay the appellate process. The court does not know which cases are being mediated, and mediation does not delay final consideration and decision by the court. The mediation is confidential and the circuit mediator does not make a report to the court. 11TH CIR. R. 33-1(c)(3).

43. Ordinarily, there is a two-tier program that permits litigants to pursue simultaneously a resolution of their dispute by legal decision or by voluntary settlement. The settlement talks do not change the briefing schedule and time to decision unless all the participants agree to delay that process. *Id.* at 33-1(e); Irvine, *supra* note \*, at 798.

44. If the mediation has an evaluative component, the conference is akin to neutral case evaluation. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 103(a), 104 Stat. 5089 (codified as amended at 28 U.S.C. § 473(a)(6) (Supp. V 1993)).

options, and evaluate the case's shortcomings. The information revealed in these private sessions is not shared with the other side unless the participants permit the mediator to transmit it.

In most cases there is extensive follow-up activity to the initial sessions, including additional telephone calls, in-person conferences, additional telephone conferences, and ex parte conferences with one party.<sup>45</sup> Every effort is made to generate offers, counteroffers, and alternative settlement options until the parties either settle or know the case cannot be settled. Where it is possible, the mediator will assist the parties in resolving related trial court cases, frequently in an attempt to achieve a "global settlement" of various lawsuits. Indeed, the mediation may continue right up to the point that the court decides the issues on appeal and issues an opinion. As a result, follow-up discussions may continue for days, weeks or longer.

Throughout mediation, the lawyers play a critical role. Without them, settlement is not possible.<sup>46</sup> Unfortunately, our adversary system creates many attorneys who are not adept at negotiating settlement for their clients and are ill equipped for the mediation forum.<sup>47</sup> "Mediation offers enormous potential for lawyers to recognize and honor the missing human dignity dimension in current versions of adversarial lawyering"<sup>48</sup> and by doing so, reach a settlement that satisfies their clients' interests. To fully serve his or her client, a lawyer must be educated about the mediation process and its potential.

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45. Ex parte contact with counsel is not a concern because the mediator is not a fact-finder or decisionmaker. Private caucuses with parties are an important tool of the mediator's trade.

46. Remember, the mediator only directs and assists the participants in reaching their own settlement.

47. In reality, many attorneys actually impede the settlement process and can snatch trial from the jaws of a settlement, or in the case of appellate mediation, snatch an adverse opinion from the jaws of settlement. *See, e.g., McKinlay v. McKinlay*, 648 So. 2d 806 (Fla. Dist. Ct. App. 1995) (claiming that attorney badgered and intimidated a party during a mediation).

48. Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1370-71 (1998).

#### IV. BECOMING AN EFFECTIVE APPELLATE ADVOCATE IN MEDIATION<sup>49</sup>

Lawyers must take responsibility to make mediation work. This means they must bring the same creativity, energy, and dedication to mediation that they bring to their other appellate duties. The successful mediation starts with a lawyer who is prepared and has the correct attitude. Both parties must enter the process with the intention of trying to resolve the problem and with the belief that settlement is possible. Mediation works because the parties make it work. It is a mechanism, not a remedy.

As the attorney better understands mediation, he or she can modify his negotiation strategy to maximize the use of the process and the mediator. For example, because mediation is a settlement tool and not a means to an end, the attorney must take the opportunity to educate the opposition about the merits of the case. Obviously, the more the attorney can convey to the other side the merit of his client's position, the more the other side will want to settle the matter. Lawyers can assist their clients in increasing the potential of the mediation process by following the Ten Commandments of Effective Mediation.<sup>50</sup>

##### A. *Commandment One: Be Professional*

Courtesy, professionalism, and a willingness to work with the other side will reap substantial benefits in reaching a

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49. Over the years I have had the good fortune to learn a great deal from my colleagues about this subject. They have been extraordinarily generous with their ideas, insights, and materials. The final distillation of these ideas will reflect much of what I have learned from them. As their materials have been completely assimilated into my thinking, individual citation is no longer possible. Nonetheless, I want to credit those whose impact has been the greatest: Professor Lela Love's presentation on the panel "Bringing Out the Best in (and Managing the Worst of) Lawyers During the Mediation Process" at the 26th Annual International SPIDR Conference conducted on October 17, 1998 in Portland, Oregon; Charles F. Guittard, Marsha L. Merrill, Broadus A. Spivey, J. Ross Hostetter, Joe D. Milner, Jr., and Tom Arnold, and their work on the program conducted by the State Bar of Texas entitled "How to Use Mediators to Get a Fair Settlement for your Client" conducted on September 18, 1992.

50. Professor Lela Love's presentation of "CALL THE LAW" while on the panel "Bringing Out the Best in (and Managing the Worst of) Lawyers During the Mediation Process" at the 26th Annual International SPIDR Conference conducted on October 17, 1998 in Portland, Oregon is the foundation for what follows.

settlement that satisfies the most important interests of the client. The participants should approach the process optimistically and with a willingness to listen and learn. The attorney and the client should review the case and their mediation plan shortly before the mediation. The lawyer should explain to the client his role, the attorney's role, and the mediator's role in the process.<sup>51</sup>

The attorney and his client should always be respectful, attentive, and courteous in the mediation. The participants should obviously be on time for the mediation. Tardiness sets a poor stage for settlement discussion because it sends the message to the waiting participants that they are not as important as the latecomers.

Once arrived, the lawyer should introduce himself and his clients to all the other participants. The attorneys should identify their respective positions so that everyone knows who is playing which role during the mediation. The attorney must have the client with adequate authority to settle present at the mediation.<sup>52</sup>

During the joint session, the attorney and client should listen carefully to the mediator and to the opposing counsel during his opening remarks.<sup>53</sup> This is not the time for the attorney to flip through her file, look at her calendar, or read the newspaper. In short, the Golden Rule applies in mediation.<sup>54</sup> Mediation is "a process governed by mutual respect, not by . . . rudeness which too often characterizes adversarial law practice."<sup>55</sup>

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51. That means the attorney must understand mediation himself. That requires self-education on the lawyer's part.

52. See FED. R. APP. P. 33 ("Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case.").

53. In one well-known study it was found that when people are listened to, their blood pressure goes down. Steven Keeva, *Beyond Words*, A.B.A. J., Jan. 1999, at 61 (citing JAMES J. LYNCH, *THE LANGUAGE OF THE HEART: THE BODY'S RESPONSE TO HUMAN DIALOGUE*).

54. "So in everything, do to others what you would have them do to you." *Matthew* 7:12 (Family Worship Bible).

55. Nolan-Haley, *supra* note 48, at 1371 (footnote omitted).

*B. Commandment Two: Use Temperate Language*<sup>56</sup>

A lawyer should never insult, threaten, or make personal attacks. The use of pejoratives, such as fraud, liar, or malingerer, attacks the integrity of the other side. As a result, they will not trust the lawyer (or his client), and without trust, there can be no settlement. In all the years I have mediated cases, I have never seen a lawyer purposely insult his opponent or his opponent's client and still persuade the other side to enter into a favorable settlement.

Personal attacks kill a mediation because the decisionmaker in mediation is not the mediator; he or she is the adversary on the other side. The opponent is the one that must be persuaded. The correct use of language—a lawyer's stock in trade—is crucial to the success of any mediation. That means the use of "I" statements instead of "You" statements. "I" statements make a point without hurting.<sup>57</sup> "You" statements are inflammatory.<sup>58</sup> "Why" statements antagonize.<sup>59</sup> To paraphrase Abraham Lincoln, the lawyer defeats his enemy not by attacking, but by making him his friend.

Everything a lawyer says in a joint session should be designed to create a contextual shift in the mind of the opponent. The goal is for the opponent to see that the lawyer and his client are reasonable and have valid reasons for their position. The lawyer wants the other side to really hear and understand what they are being told. To start the shifting process, the lawyer needs to tell them something new. The person whose expectations must be met to settle the case is sitting across the table. The lawyer must work to shift the opponent's evaluation closer to his, and this is done most effectively by using language that *draws*—not *repels*. The level of client attentiveness is extremely high in mediation. Clients are listening very carefully. The attorney should give them new information, and use

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56. I credit Tom Arnold of Texas for many of these observations.

57. "I felt hurt when I heard what you said about how women should not be firefighters" makes the point about how the client felt about what her opposing counsel said.

58. "You said women are too weak to be firefighters" puts the other side on the defensive. When someone is defensive, he or she stops hearing the speaker and is busy formulating a response.

59. "Why do you always denigrate women?" can lead nowhere productive.

language to move them toward the attorney's position rather than push them away from it.

### *C. Commandment Three: Listen Carefully*

However, temperate language alone will not persuade the other side to settle. To successfully draw the adversary to a position, the lawyer must listen to him with the kind of attention that makes the other person feel not only heard, but also seen. To do this, the attorney must engage in "active listening."<sup>60</sup>

Active listening is a process of hearing what the speaker is saying, understanding it, and responding with a statement that reflects and mirrors what the speaker has said.<sup>61</sup> "[Mediations] usually begin as conflict situations and, as such, generate feelings of mistrust, fear and anger that are counterproductive to establishing a cooperative or problem-solving bargaining relationship."<sup>62</sup> Interpersonal techniques, such as active listening, facilitate cooperation because the other side believes the lawyer understands his concerns. An attorney can develop this rapport with the other side without "giving up" anything on the merits. Therefore, active listening can be regarded as "the cheapest possible concession."<sup>63</sup>

An attorney who is an active listener, especially with his own client, will also take advantage of the opportunity to learn new things. Even on appeal, cases are not static. Everything continues to evolve: The law changes, circumstances change, the decisionmakers change, new case law comes down. All these things can affect the settlement posture of the case.

Importantly, by carefully listening, the lawyer can learn how the client *feels* about the case.<sup>64</sup> Feelings are facts, and the

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60. DONALD G. GIFFORD, *LEGAL NEGOTIATION* 89-90 (1989).

61. *Id.* at 90.

62. *Id.* at 89-90.

63. *Id.* at 90 (footnote omitted).

64. At this point, many readers are saying, "So what, I don't care how anyone *feels* about this case, the law is the only important thing that matters." Not so. Look at any futile litigation that goes on like the case of Jarndyce and Jarndyce in *Bleak House*. More is at play in a lawsuit than just a judicial interpretation of the law.

At the present moment there is a suit before the court which was commenced nearly twenty years ago, in which from thirty to forty counsel have been known to appear at one time, in which cost have been incurred to the amount of seventy

attentive attorney will learn which feelings are at work in the particular case, giving him an opportunity to effectively deal with those feelings rather than letting them go unexpressed and unresolved. Unattended feelings have derailed resolution in many cases.<sup>65</sup> For example, many clients believe, especially when the litigation at the trial level ended in a summary judgment or other “premature” end, that they are entitled to their day in court. An attorney who is attentive to her client’s feelings will be more able to help the client to become psychologically ready to settle the case and put the matter behind him.

Listening carefully also allows the attorney to ferret out the *interests* of the parties instead of focusing only on their *positions*.<sup>66</sup> This is crucial in permitting the lawyer to understand and contrast the parties’ interests and positions. They may be different, and a solution may be available that will satisfy the interests of both sides.<sup>67</sup>

The cardinal rule of mediation is to “seek first to understand, only then to be understood.”<sup>68</sup> That requires the attorney to listen carefully.

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thousand pounds, which is a *friendly suit*, and which is (I am assured) no nearer to its termination now than when it was begun. There is another well-known suit in Chancery, not yet decided, which was commenced before the close of the last century and in which more than double the amount of seventy thousand pounds has been swallowed up in costs.

CHARLES DICKENS, *BLEAK HOUSE* viii (Signet Classic 1964) (1853) (emphasis in the original). Put another way, the lawyer should ask himself, “Am I paying enough attention to the people problem?” ROGER FISHER & WILLIAM URY, *GETTING TO YES* 19 (Bruce Patton ed., 2d ed. 1991).

65. Mediators learn early that they must allow the parties to “vent” and failure to do so can create a major roadblock to settlement later. Listen, and if you hear a party resisting settlement because of “principle,” then he has probably not been carefully listened to, and his feelings have not been taken into account.

66. FISHER & URY, *supra* note 64, at 40.

67. The classic example is the two businesses fighting over an orange crop. Each claims to own it. The *position* of each party is that it is entitled to full possession of the crop. The *interests* are different. One company wants the juice of the crop to make frozen orange juice. The other company wants the orange peels to make marmalade. Both companies’ *interests* can be satisfied without ever deciding the legal issue of title. If the lawyers focused exclusively on the parties’ positions, this solution would not be possible.

68. I credit Tom Arnold of Texas with this expression.



*D. Commandment Four: Know the Client's Interests and Issues*

The lawyer's preparation goes beyond knowing the circuit's rule that governs the mediation session.<sup>69</sup> The attorney must be able to identify and articulate the issues and common interests in the case. To be able to do this, the attorney and client must be prepared. An attorney must never go to a mediation and "wing it." The deal that is made at mediation is final; there is no alternative after the settlement is completed.

An important step in the attorney's and the client's preparation for mediation is an exploration into what is really driving the client and what the client wants to accomplish with the appeal. This means the client must seriously think about the consequences of going forward. He can do that only if the attorney has given him a realistic analysis of the benefits and risks on appeal. "The dialogue between lawyers and clients must take into account practical, ethical, and moral considerations."<sup>70</sup> The lawyer must give the client a realistic analysis of fairness considerations and make the client aware that surprises occur during the course of the appeal. For example, new case law may come down during its pendency that completely obliterates or otherwise weakens the client's position.

To organize the client's concerns and assess his expectations, the lawyer and the client should explore the client's Best Alternative to a Negotiated Agreement (BATNA)<sup>71</sup> and Worst Alternative to a Negotiated Agreement (WATNA)<sup>72</sup> before the mediation. No one is prepared to commence a negotiation and make intelligent settlement decisions until she truly understands her BATNA and is able to express it clearly. A carefully considered BATNA provides a useful measuring tool for the various offers on the table; it will drive the client toward an offer that is better than the BATNA and away from an offer that is not. In addition, if the lawyer and client become

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69. See generally 11TH CIR. R. 33-1 Circuit Mediation Office. Knowing the rules is extremely important, and should not be neglected.

70. Nolan-Haley, *supra* note 48, at 1388.

71. FISHER & URY, *supra* note 64, at 99.

72. The flip side.

concerned that the WATNA is highly likely,<sup>73</sup> an even slightly better offer will seem more attractive.

To assess the client's BATNA at the appellate level, the attorney must do the math for the client. He must articulate for him what the appeal will really cost in time, money, and stress. If a plaintiff is successful in overturning on appeal a summary judgment granted to the defendant, that is not the same thing as "winning the case." The client must be made aware that a victory at the court of appeals may sometimes mean just more litigation, more work, more expense, and more frustration. In addition, the attorney must keep in mind each side's tolerance for risk and willingness to "roll the dice." Finally, the lawyer must be candid and honest in assessing alternatives. When one side says, "The cost of defending the appeal is \$1,000," and the other side says they will accept the \$80,000 their opponent would spend on the appeal, probably neither side is being realistic in assessing the financial aspect of their BATNA.

#### *E. Commandment Five: Identify Any Common Interests*

Obviously, it is not enough that the lawyer know the interests that drive his own client. It is equally important that the attorney be fully prepared to acknowledge the other party's interests, perspectives, and feelings as well. That means that the attorney must think carefully about the opponent's BATNA. Doing so will allow the attorney to better identify common interests between the parties. If there are no common interests, many parties do share an interest in getting on with their lives, putting the conflict behind them, saving the cost of appeal, resolving the matter in a way that is satisfactory to all, and feeling respected. Identifying the common interests is more than an academic exercise. With common interests comes motivation, with motivation come concessions and solutions, with concessions and solutions comes settlement.

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73. At the Eleventh Circuit Court of Appeals, only 17% of civil cases will be reversed on appeal. That means that the appellant will lose 83% of the time.

*F. Commandment Six: Show Off Your Preparedness*

Mediation is a rare opportunity to have the opponent's decisionmaker give settlement talks his undivided attention. Two things—the Confidential Mediation Statement and the lawyer's opening remarks—are the foundation of the lawyer's presentation and, therefore, should be the focus of her preparation. They require that the attorney analyze her client's problem, consider the possible solutions, and devise a strategy for persuading her opponent to settle on favorable terms. Done well, these items show the other mediation participants that the lawyer has complete mastery over the case, has carefully considered the risks and benefits of the appeal, has weighed the alternatives, and has devised possible resolutions to the conflict.

*1. Confidential Mediation Statement*

The Circuit Mediation Office recommends that lead counsel submit a "Confidential Mediation Statement" before the mediation.<sup>74</sup> The statement does not become part of the court file, nor is it shared with the other side.<sup>75</sup> The statement should be in letter form, addressed to the mediator, and should provide the information necessary for the mediator to assist the parties in seeking settlement.

At a minimum, the statement should include the following elements: a brief recitation of the circumstances that gave rise to the litigation, the present posture of the case including any matters pending in the lower court or in any related litigation, and any recent developments that may impact the resolution of the case. It is helpful to include the history of any efforts to settle the case, including any prior offers or demands, a summary of the parties' legal positions, and a candid assessment of their respective strengths and weaknesses. The mediator needs to know which individuals and counsel should be directly involved in the settlement discussions and needs to have a description of any sensitive issues that may not be apparent from the court records but will influence the settlement negotiations. It is particularly helpful for the mediator to know the nature and

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74. 11TH CIR. R. 33-1(d).

75. *Id.*

extent of the relationship between the parties and their counsel.<sup>76</sup> The attorney should add any suggested approaches for the mediator to take in an attempt to settle the case,<sup>77</sup> as well as any suggestions for creative solutions and a list of the priority of the client's interests.

It is not helpful to send pleadings instead of a candid, narrative mediation statement. Pleadings do not tell the mediator much about the problem that must be solved to settle the case.<sup>78</sup> They do not contain the essential interests of the client, nor are they candid assessments of the case. Likewise, statements that are mere rants or generalized adversarial posturing are also unhelpful.

The Confidential Mediation Statement is one of the most important tools that the mediator has with which to assist the parties in reaching settlement.<sup>79</sup> I am constantly surprised to see how few attorneys take advantage of the chance to submit one.

## 2. *Opening remarks*

There are two means of persuading the opposition in a mediation. The first is direct persuasion in the joint session through the lawyer and client's presentation. The second is indirect persuasion through the mediator by arming her with information during the caucus that she will present to the other side during succeeding caucuses. The objectives<sup>80</sup> of the opening remarks are to build rapport,<sup>81</sup> influence expectations,<sup>82</sup> and set a cooperative and reasonable tone.<sup>83</sup>

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76. If the parties have never spoken, and the lawyers only communicate by fax, the mediator needs to know this.

77. What is the problem to be solved? What should be the sequence of issues addressed? What are the necessary terms in any settlement reached?

78. On a more practical note, why send the same brief that was unsuccessful in persuading the judge in the trial court?

79. There is an important caveat in using a Confidential Mediation Statement. In at least one jurisdiction, a lawyer was admonished by his bar association for being too candid in his confidential statement to the mediator. The bar found that the lawyer had violated Rule of Professional Conduct 1.6 by revealing client confidences without permission. *Disciplinary Notices*, WASH. ST. B. NEWS, May 1999, at 53. Clearly, a lawyer must be sensitive to his ethical obligations, even when engaged in mediation.

80. I have Charles Guittard, Attorney's Opening Statement in Mediation, to thank for these observations (unpublished work on file with author).

81. Did the attorney establish personal credibility? Did the attorney affirm his respect for his opponents? Did the attorney use active listening techniques? *Id.*

In the joint session the attorney should make a short presentation to the mediator and the other side. He should discuss the facts, the record, the law and the practical points. This concise presentation should include a discussion of the issues on appeal, the best evidence in the record, the most favorable applicable law, and the practical advantages to the other side of settling.

This presentation can include visual aids if they would aid in the mediator's and the opponent's understanding of the case and the client's interests. The attorney should consider softening the adversarial tone of his arguments by being openly empathetic *to the other party*, by expressing an understanding of the perceived plight of the other side. A good, empathic opening by a well-rehearsed and skillful lawyer directed at the other side, rather than exclusively to the mediator, can set the stage for a good settlement.

A good opening avoids discussing money,<sup>84</sup> never sets a "bottom line," and avoids posturing. Instead, it attacks the problem to be solved, not the people involved.<sup>85</sup> The successful lawyer uses language to draw the other side to his evaluation of the case and to his suggestions for settlement.

Just as a strong and empathetic opening can move the case toward a favorable settlement, some things will doom the case to impasse, including arrogance, hostility, abusive tactics, an emotional "jury" speech, or a conclusory, generalized pitch that does not focus specifically on key points of the case.

The time expended in preparing for these remarks is important for another reason. During mediation, just as in trial, the clients are constantly evaluating the lawyers and comparing them. The better-prepared lawyer will shine in comparison to his

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82. Did the attorney state the client's perspective in understandable terms and manner? Did the attorney use effective presentation techniques? Did the attorney create the appearance of significant strength or uncertainty? Did the attorney address the opponent's needs and alternatives? *Id.*

83. Did the attorney project willingness to explore settlement? Did the attorney emphasize that *if* a settlement agreement is reached, it must be superior to the client's appeal options? Did the attorney emphasize that *if* a settlement agreement is reached it must be fair to the client? *Id.*

84. Money is not warm and cuddly. The lawyer is building rapport at this point. Money discussions should be left for later.

85. FISHER & URY, *supra* note 64, at 17.

less prepared colleague who is “winging” the mediation. This means the unprepared attorney’s client will develop doubts about the strength of his case and will more readily compromise.

### *G. Commandment Seven: Know Your Case*

Credibility requires equal parts honesty and knowledge. The lawyer must be prepared on both fronts. The lawyer’s goal in mediation is not merely to argue the merits of the case, but to overcome the inherent distrust of the adversary and to maximize the concept that a dispute is a problem to be solved together.<sup>86</sup> But a case settles only when each side appreciates the merit of the other side’s case. The more each side appreciates the opponent’s merit, the more likely the case will settle.

That means the lawyer must be prepared to articulate the strengths and weaknesses of his case. He should discuss the weaknesses openly and candidly and describe how he will handle them and minimize their impact. Acknowledging these vulnerabilities and analyzing how those vulnerabilities impact the case will build credibility and trust in both the other attorney and the mediator.

One of the roles of a mediator is to ask probing questions about the case. The lawyer’s role is to answer these difficult questions. The attorney who is thoroughly prepared and has carefully thought through the potential pitfalls of the case will build credibility with the mediator and make the lawyer look good to his client. Be honest and forthright with the mediator and give her an honest assessment of the case.

In addition to thinking about his own case, the lawyer should spend time analyzing how his opponent will overcome his weaknesses and how his case’s strengths can be minimized. A fair resolution requires constant re-evaluation and compromise.

### *H. Commandment Eight: Search for Solutions for Both Sides*

Mediation is a rare opportunity to be creative in solving the client’s problem. Remember that the appeal started out as a

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86. I credit Tom Arnold of Texas for this expression.

problem the client brought to the lawyer to solve. The trial lawyer restructured the problem into a lawsuit. Mediation works to deconstruct the lawsuit back into a problem, and then strives to solve the problem. Mediation “captures the human element which is so often missing when lawyers do most of the talking and translate client stories into legal context.”<sup>87</sup> That means the lawyer must be concerned, creative, and willing to look “outside the box” to achieve a satisfactory result. Before the mediation the client and lawyer should explore various options for resolution. By “brainstorming” about what each party’s interest is (what he wants and why), the participants can avoid getting caught in the rut of looking only at the legal positions and the asserted legal rights.

This type of thinking takes creativity and flexibility. Creative business alternatives and options are the most fertile areas for these types of solutions. This is particularly true where the parties want or must have a continuing relationship. In searching for business alternatives, concessions should be considered and evaluated. Each side probably values and prioritizes some items differently. This allows the parties to trade concessions that are more valuable to the receiver than the giver.<sup>88</sup> This type of exchange begets settlements.

Before mediation begins, the client should prioritize his options. Even so, the client must stay flexible and focus on accomplishing his long-term goals. In the mediation neither side should hesitate to start the settlement discussion. Both sides should be prepared to do “the dance of negotiation.”<sup>89</sup>

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87. Nolan-Haley, *supra* note 48, at 1375.

88. This is called “logrolling.” See GIFFORD, *supra* note 60, at 32 (identifying logrolling agreements as those “in which the parties trade concessions on different issues on which they place differing priorities, so that both parties are more satisfied than if they merely conceded equivalent amounts on each issue”); FISHER & URY, *supra* note 64, at 72-74.

89. If the other side does not have to work for a resolution, he will never believe that he could not have gotten more. A somewhat challenging road to settlement yields a greater *sense of satisfaction* with the result. However, I am not suggesting the participants turn the mediation into a death march to resolution.

### *I. Commandment Nine: Support Your Proposals*

If possible, search for independent, objective benchmark standards for your disputed issues.<sup>90</sup> In a property value dispute, look at what sales values of comparable properties have been. In employment discrimination cases, comparable verdicts can serve as the objective basis as can the criteria set out in the statute.<sup>91</sup> The object is to link the settlement proposal to something solid rather than the attorney's "gut feeling" or the client's wish list. This type of objective data is difficult to acquire during the mediation. That means the lawyer must make this part of the pre-mediation preparation.

Even with prior preparation, the lawyer and the client must be prepared for shifting positions during the course of the mediation. The client must be ready and willing to re-evaluate his settlement proposal as new information comes to light. As this additional information becomes available, the lawyer and client will continually evaluate and assess if the client is better off with a mediated agreement or with the appeal.<sup>92</sup>

During the course of the mediation, it is important to avoid "backtracking" from the last settlement proposal before mediation. In appellate mediation, this is relatively easy because there has usually been a dispositive decision since the last settlement talks. If the settlement posture must be changed, however, it should be linked to some factors that have changed in the interim that justify the shift. These factors must be clearly articulated to the other side. An unexplained change in settlement posture will affect the opponent's perception of good faith, and the attorney who shifts the prior settlement offer should be prepared for the other side to respond to the change by also backtracking from their prior settlement offer.<sup>93</sup>

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90. FISHER & URY, *supra* note 64, at 81.

91. *See, e.g.*, Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000(e).

92. That is why it is so important to consider and develop a "Best Alternative to a Negotiated Agreement." FISHER & URY, *supra* note 64, at 99.

93. I am consistently surprised to see parties *increase* their demands after *losing* at the trial court. The concept of sunk costs seems alien to them. This approach toward settlement makes resolution much more difficult.



New settlement proposals should not be disclosed in the joint session, but should be held until after the attorney meets privately with the mediator.

### *J. Commandment Ten: Let Everyone Win*

Success in mediation depends on each side making a decision the other party wants. Both the lawyer and the client should work hard to make the choice to settle as painless as possible for their adversary.<sup>94</sup> Everyone is motivated by self-interest. If a proposed settlement satisfies the opponent's interests, it is easy for the opponent to agree to the terms. Therefore, seeking to satisfy the other side's interests will often work to satisfy the lawyer's own client's interests.

Once a settlement has been reached, the work is not over. In memorializing the terms of the agreement, there are some simple rules that should be observed. Now is not a time for the attorney to acknowledge that he had no chance of prevailing on appeal. The client and lawyer should not gloat or brag about how happy they are about the terms of the settlement. They should not laugh or joke, especially if hard feelings were present in the case, or if the opposing participants are not pleased with the outcome.

## V. CONCLUSION

As the attorney and client enter mediation, even at the appellate level, they must both keep in mind that "a dispute is a problem to be solved together, not a combat to be won."<sup>95</sup> Mediation has the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."<sup>96</sup>

The mediator plays many important roles in helping the parties come to a resolution. First, the mediator is there to help

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94. FISHER & URY, *supra* note 64, at 76.

95. I credit Tom Arnold of Texas for this expression.

96. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

the parties establish a constructive setting for negotiation. Second, the mediator helps the parties examine and clarify their interests, keeping them focused on what is important to them in resolving the dispute, not just on their stated positions. Third, the mediator helps deflate unreasonable claims and helps the parties develop practical goals and settlement terms with which they can be satisfied. The mediator does this by seeking common ground for discussion, keeping the negotiation going, and articulating possible grounds for agreement.

But no matter how skilled the mediator, the mediation is only as good as the parties and attorneys let it be. The clients must be prepared to put the dispute behind them, and the lawyers must be well prepared to help their clients solve the problem.

For those willing to put in the effort, this article provides some guideposts for mediating in the federal courts of appeals.<sup>97</sup> It is worth the effort to make that process more productive. Mediation is the ultimate contact sport. It takes energy, skill, timing, and patience. The end result is worthwhile. Mediation settlements result in higher client satisfaction, better client relationships, lower cost, less delay, and higher compliance with the settlement terms. The mediator is only part of the solution. Attorneys are equally important, for they help guide their clients toward responsible decisionmaking in mediation.<sup>98</sup> To accomplish this, the lawyer must learn to be a problem solver

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97. Anyone who appeals federal civil cases will probably find himself involved in one of the circuit mediation programs. To learn more about them, the reader can refer to ROBERT J. NIEMIC, *MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1997). This source book is a reference guide on mediation and conference programs in the federal courts of appeals. This publication was undertaken by the Federal Judicial Center in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration.

The federal courts of appeals are not alone in pursuing appellate mediation. State courts of appeals are experimenting as well. See Richard Birke, *Bargaining in the High Courts: Settlements and the Oregon Court of Appeals*, 31 WILLAMETTE L. REV. 569 (1995); Roger A. Hanson, *An Assessment of Florida's Fourth District Court of Appeal's Settlement Conference Program*, 18 FLA. ST. U. L. REV. 177 (1990). My suggestions are probably equally applicable to other mediation programs.

98. Nolan-Haley, *supra* note 48, at 1381.

and a peacemaker for the client, as well as his sword and his shield.<sup>99</sup>

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99. Janet Reno, Address to the American Association of Law Schools (Jan. 9, 1999).